

# 2020 Appeals Webinar

December 4, 2020



Arizona Adult Protective Services  
Overview - 3 Slide Handouts

## The Arizona Supreme Court's Discretionary Review in Criminal Cases

Presented by:

**Andrew Reilly**

Criminal Appeals Unit Chief Counsel, Arizona Attorney General's Office

&

**Linley Wilson**

Criminal Appeals Section Chief Counsel, Arizona Attorney General's Office

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

3838 N. Central Ave., Suite 850

Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ

EXECUTIVE DIRECTOR

# The Arizona Supreme Court's Discretionary Review in Criminal Cases

*Linley Wilson, Criminal Appeals Section Chief Counsel, Arizona Attorney General's Office*  
*Andrew Reilly, Criminal Appeals Unit Chief Counsel, Arizona Attorney General's Office*

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## Overview

The Arizona Supreme Court's primary judicial duties under Article VI, §5 of the Arizona Constitution, are to review appeals and to provide rules of procedure for all the courts in Arizona. It is the highest court in the state of Arizona and is often called the court of last resort.

The Supreme Court has discretionary jurisdiction, meaning that the court may refuse to review the findings of the lower court. Cases in which a trial judge has sentenced a defendant to death, however, automatically go to the Supreme Court for review.

Source: AZ Supreme court website

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## Organizational structure



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Recent retirees from the court:



**John Pelander**  
Associate Justice of the Arizona Supreme Court  
In office July 28, 2009 – March 1, 2019  
Appointed by Jan Brewer  
Preceded by Ruth McGregor  
Succeeded by James Beene

**Scott Bales**  
40th Chief Justice of the Arizona Supreme Court  
In office June 27, 2014 – July 1, 2019  
Preceded by Rebecca White Herd  
Succeeded by Robert M. Brutner  
Vice Chief Justice of the Arizona Supreme Court  
In office June 26, 2012 – June 26, 2014  
Preceded by Andrew D. Hurwitz  
Succeeded by John Pelander  
Justice of the Arizona Supreme Court  
In office June 16, 2005 – July 31, 2019  
Appointed by Janet Napolitano  
Preceded by Charles Jones  
Succeeded by Bill Montgomery

Arizona Supreme Court justices (from left) Chief Justice Scott Bales, Vice Chief Bales and Robert Brutner watch as newly appointed justices Andrew Gould and at the Capitol in Phoenix. Matt York/Associated Press

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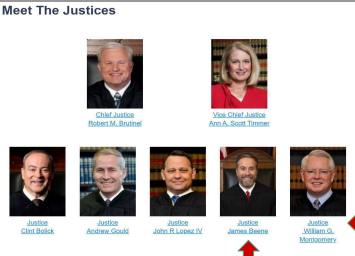
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Arizona's current 7-justice supreme court

Meet The Justices



**Chief Justice**  
Robert M. Brutner

**Vice Chief Justice**  
Ann A. Scott Trimmer

**Justice**  
Chris Bales

**Justice**  
Andrew Gould

**Justice**  
John A. Love IV

**Justice**  
James Beene

**Justice**  
William J. Montgomery

Justice Beene and Justice Montgomery were appointed in 2019

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Discretionary Jurisdiction

Only need 3 out of 7 justices to vote to grant review (42.9%)



Criteria for petitions for review in criminal cases - Rule 31.21(d) of the Arizona Rules of Criminal Procedure:

**(d) Contents.**

**(1) Generally.** A petition or cross-petition must contain concise statements of the following:

(C) the reasons the petition should be granted, which may include, among others, that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that there are conflicting decisions by the Court of Appeals, or that important issues of law have been incorrectly decided.

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### Discretionary Jurisdiction


"No Arizona decision controls the point of law in question."

New statute?

New rule?

Has AZ Supreme Court ever considered the question?

Issue of first impression



Explain why the issue is legal, not factual

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### Discretionary Jurisdiction



- "Decision of the supreme court should be overruled or qualified"
  - What do other states/federal courts say about the issue?
  - Expand research: 50-state survey/analogous cases from other jurisdictions
    - Example: AZ Const. modeled after WA Constitution; AZ courts find Washington caselaw persuasive in that context
  - Has more recent US Supreme Court precedent called into question AZ decisions?
  - Be mindful of stare decisis - how long has the case been on the books?

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### Discretionary Jurisdiction

- "Important issues of law have been incorrectly decided"
  - Issue of statewide importance/frequency
  - Interpretation of AZ Constitution or statute
  - How many cases will the decision affect?
    - string cite to COA opinions addressing issue
  - Focus on the lower court decision and show, not tell, why it's wrong



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### Discretionary Jurisdiction

Other relevant considerations:

- Published v. unpublished
- Dissent by COA judge in your favor
- AZSC is generally not an error-correction court (i.e., if COA's harmless error analysis is wrong in your view)
- Consider whether to ask for depublication as an alternative
- Can also ask the court for expedited review to place the case on an earlier calendar; explain why expedited review is warranted

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If you're satisfied with the COA opinion and are discouraging further review in your response:

- Describe how COA consistently applied an AZ Supreme Court opinion
- Issue may not warrant review because:
  - Factually-unique case
  - Issue is fact-intensive and not one of law
  - Involves application of settled principles
  - Are there alternative arguments you made below that the COA did not address (so if court grants review, it will have to address them)?

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Other Potential Dispositions (Instead of Granting Review) Include:

- Deny review
- Depublish court of appeals' opinion
- Per Curiam unanimous opinion with no lead author
- Continue review on supreme court's calendar, grant review of a similar case, and remand to court of appeals when the court decides the similar case
- Unanimous decision order granting review w/out oral argument




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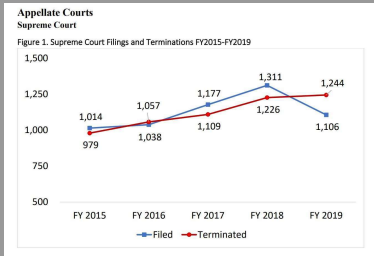
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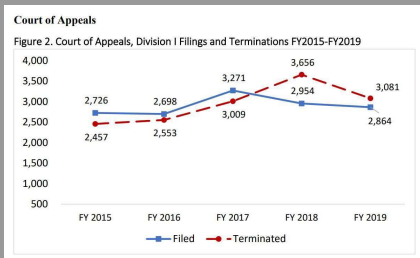
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### Total cases filed and terminated in AZ Supreme Court



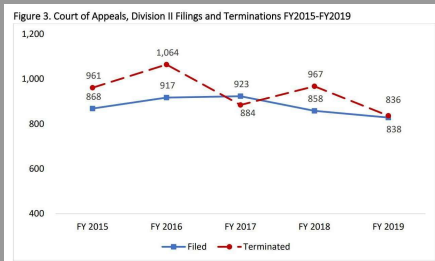
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### Total cases filed & terminated in COA 1



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### Total cases filed & terminated in COA 2



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## Analysis of 2017 - 2020 opinions in non-capital criminal cases

Goals include identifying:

- Common themes/trends in the court's decisions
- Frequency of unanimous decisions
- Whether any justices are more likely than others to author decisions in non-capital criminal cases
- Factors that affect whether the supreme court grants review

...to make predictions for 2021

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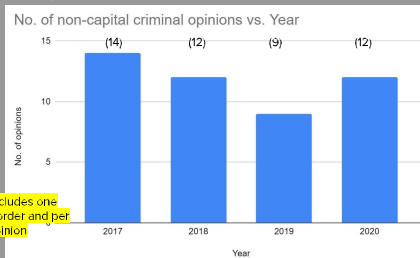
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## 4-year comparison




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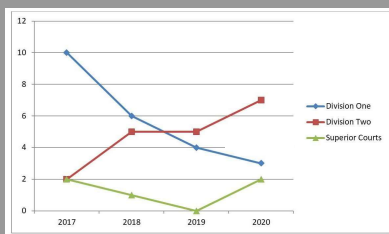
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## 4-year comparison - originating lower court

Superior courts = special actions in which COA declined jurisdiction, then AZ Supreme Court granted review




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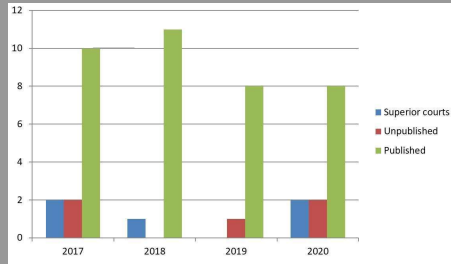
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4-year comparison - type of lower court decisions



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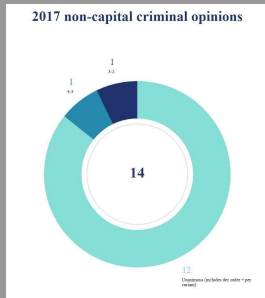
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2017

4-3 (Cespedes v. Lee): **Gould**, Bales, Pelander, Timmer, Lopez, Brutinel, Bolick (dissent)

3-2 (State v. Heaton): **Bolick**, Bales, Timmer, Pelander, Brutinel (dissent)



J. Lopez recused in 4  
J. Timmer recused in 1  
J. Gould recused in 1

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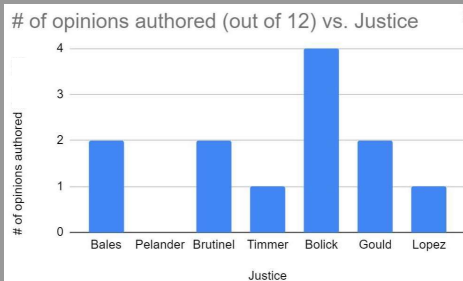
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2017



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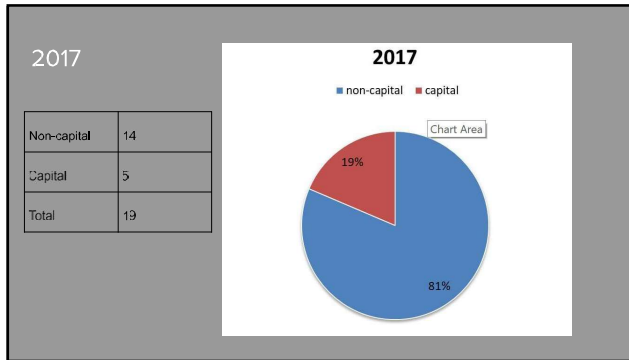
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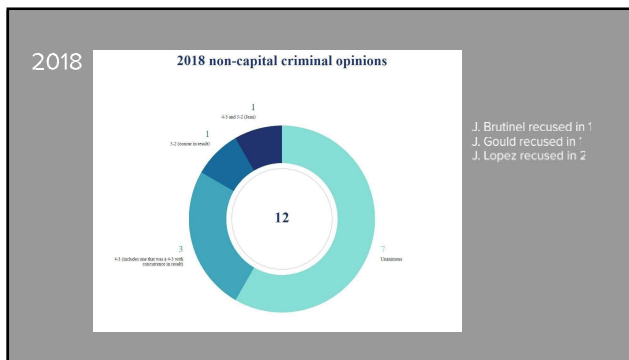
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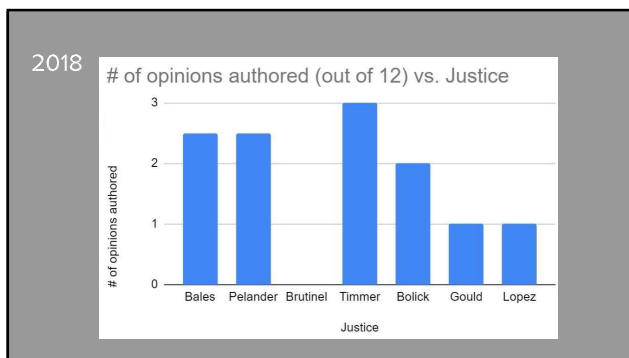
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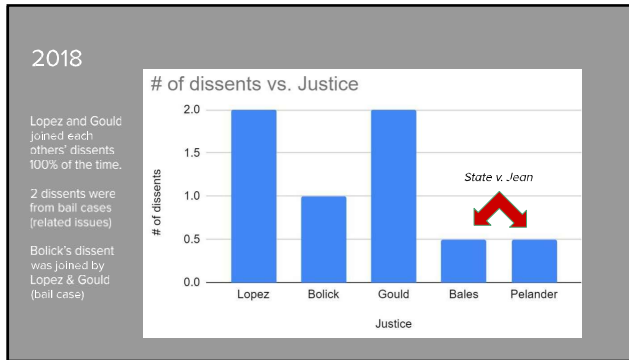
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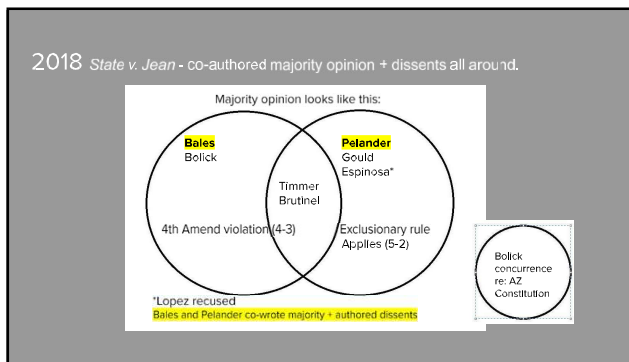
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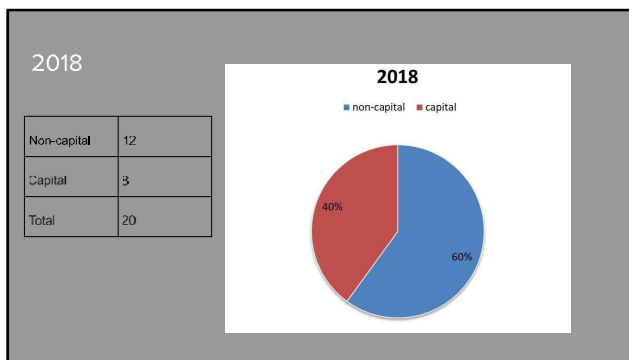
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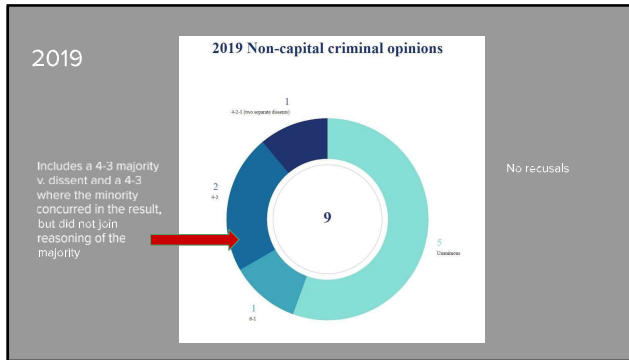
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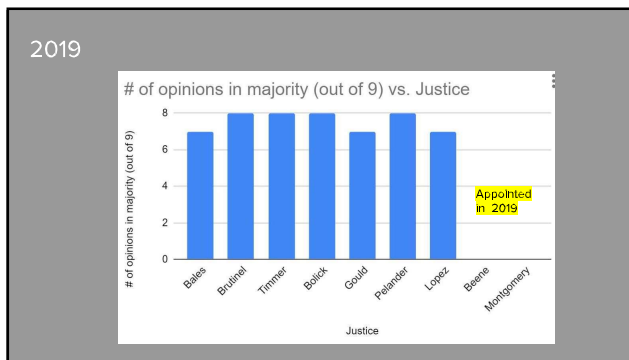
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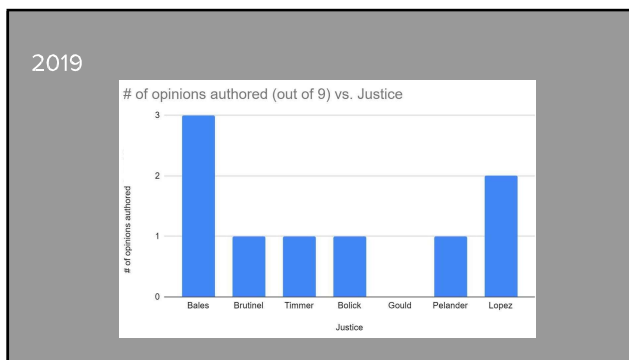
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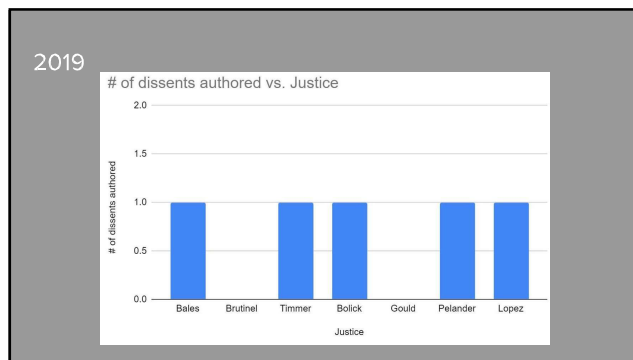
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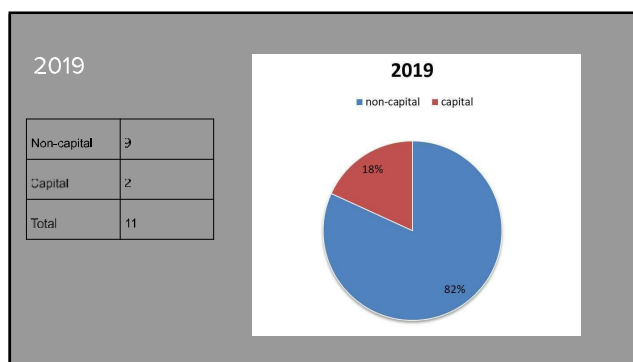
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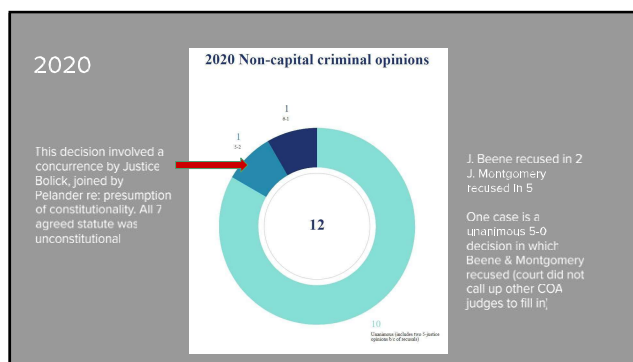
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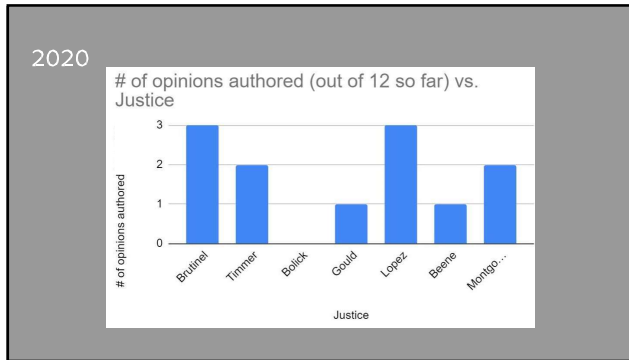
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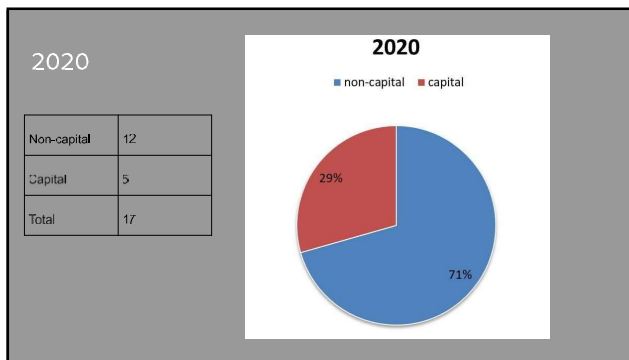
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Predictions for 2021

- Cases interpreting the Arizona Constitution
  - c. Remember J. Bolick's concurrence in *Jean* (2018)? "I hope that future cases will present an opportunity to determine whether our Constitution provides greater limits on government discretion in this context."
  - c. *State v. Mixton* - Oral argument held in Feb. 2020.
- More unanimous criminal opinions (all 7 or sometimes just 5 if 2 recusals)? Disagreement on Fourth Amendment & constitutional suppression issues?
- Granting review of cases to clarify legal standards when there are conflicting court of appeals cases

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Questions / comments?

- Linley - [linleywilson@azag.gov](mailto:linleywilson@azag.gov)
- Andrew - [andrew.reilly@azag.gov](mailto:andrew.reilly@azag.gov)



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